Order 2009-4-5
Served April 7, 2009

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 7th Day of April, 2009

Joint Application of **AIR CANADA** **THE AUSTRIAN GROUP** **BRITISH MIDLAND AIRWAYS LTD** **CONTINENTAL AIRLINES, INC.** **DEUTSCHE LUFTHANSA AG** **POLSKIE LINIE LOTNIECZE LOT S.A.** **SCANDINAVIAN AIRLINES SYSTEM** **SWISS INTERNATIONAL AIR LINES LTD.** **TAP AIR PORTUGAL** **UNITED AIR LINES, INC.** to Amend Order 2007-2-16 under 49 U.S.C. §§ 41308 and 41309 so as to Approve and Confer Antitrust Immunity	**Docket OST-2008-0234**

SHOW CAUSE ORDER

I. SUMMARY

By this Order, the Department proposes to grant authority for Continental to be added to the existing immunized alliance involving Air Canada, Austrian, bmi, LOT, Lufthansa, SAS, Swiss, TAP, and United[1] (collectively, the "Joint Applicants" or the "applicants") and, within that broader alliance, authority for Air Canada, Continental, Lufthansa, and United to launch an integrated joint venture called Atlantic Plus-Plus. The four participants to the joint venture plan to operate a substantial portion of their international air services within the venture. The joint venture, as well as the broader alliance, will create substantial new service options and fare benefits for consumers. We tentatively find that the proposed alliance is consistent with the public interest, will produce public benefits, and will not substantially reduce competition. Accordingly, we tentatively approve the proposed alliance agreements and grant the Joint Applicants antitrust immunity.

[1] We refer to airlines and parties by their common names.

We also tentatively find that the grant of antitrust immunity should be subject to conditions. In addition to the standard conditions we have imposed in many cases, we are proposing specific conditions designed to preserve competition and ensure the realization of public benefits. As a threshold matter, the scope of antitrust immunity is limited to foreign air transportation, consistent with our authority. The Joint Applicants may not cooperate in domestic air transportation, and we propose to require certain applicants to adhere to competition guidelines that will preserve domestic competition. In addition, we would require the Joint Applicants to implement the Atlantic Plus-Plus joint venture completely within 18 months, as planned by the applicants, for the antitrust immunity to remain effective. We would also require the Joint Applicants to submit annual reports to the Department regarding the status of their cooperation and efforts to implement their alliance agreements. Finally, we would preserve limited "carve outs" in the Chicago-Frankfurt and Washington-Frankfurt markets until the Joint Applicants completely implement the Atlantic Plus-Plus joint venture. Upon complete implementation, the proposed alliance will not operate with any carve outs between the United States and Europe. The proposed alliance will, however, continue to operate with limited carve outs between the United States and Canada, pursuant to previous orders that remain unchanged.

We direct interested parties to show cause why we should not make final the tentative findings and conclusions that follow. Parties have 21 calendar days to submit comments and seven business days to submit reply comments.

II. BACKGROUND

A. History

The Joint Applicants are requesting a grant of immunity from the U.S. antitrust laws to operate a commercial alliance. Under the Department's established policy, the existence of an "open-skies" regulatory framework is a necessary predicate to our consideration of requests for antitrust immunity. Open-skies international aviation agreements encourage more competitive airline service because market forces, not restrictive agreements, discipline the price, frequency, capacity levels, and quality of airline service. We are willing to consider the instant request because the United States has an "open-skies-plus" air transport agreement with the European Community and its Member States that includes as signatories the homelands of most of the foreign-carrier applicants – namely Austria, the United Kingdom, Germany, Poland, Sweden, Denmark, and Portugal.[2] The other three homelands involved – Canada, Norway, and Switzerland – are parties to bilateral open-skies agreements with the United States.[3]

[2] U. S.-EU Air Transport Agreement, signed April 30, 2007.

[3] Air Transport Agreement Between the Government of the United States of America and the Government of Canada, signed March 12, 2007; United States-Norway Air Transport Agreement of October 6, 1945, as amended; United States-Switzerland Air Transport Agreement, initialed July 18, 2008.

In a line of decisions dating back to 1996, we have granted authority for various Star members from North America and Europe to operate an immunized alliance.[4] This case represents the addition of a new carrier, Continental, to that alliance. Continental has recently announced its intention to withdraw its membership in the SkyTeam alliance and end its association with Delta and Northwest, the latter of which is now a wholly-owned subsidiary of Delta. At the same time, Continental announced its intention to join Star, seek antitrust immunity with certain Star carriers, and establish a long-term, comprehensive commercial relationship with United to replace its relationships with Delta and Northwest.[5]

On July 23, 2008, the Joint Applicants filed an application to initiate this proceeding. To ensure a complete record, we required the submission of additional evidence.[6] On November 12, 2008, we established a schedule for public comments, which we revised and extended twice at the request of certain parties.[7] Numerous comments have been filed.

B. Joint Applicants' Filings

The Joint Applicants have submitted a written application, documents, exhibits, booking data, answers to interrogatories, confidentiality guidelines, letters of support, pleadings, and copies of written agreements governing the proposed alliance (the agreements are referred to as the "Alliance Agreements").[8] According to the Alliance Agreements, the proposed alliance is a broad association among the ten applicants in the areas of planning, marketing, and operations. It provides for code sharing, coordination of customer service and ground operations, linkage of frequent flyer plans for reciprocal earning and use of mileage, coordination of sales and corporate contracts, and joint pricing and management of capacity on certain routes.

At its core, the proposed alliance features an integrated joint venture called Atlantic Plus-Plus ("A++") among four of the applicants – Air Canada, Continental, Lufthansa, and United.[9] A++, which replaces the older "Atlantic Plus" arrangement between Lufthansa and United, brings the transatlantic routes served by the participants within the joint venture. The participants will jointly manage capacity, scheduling, pricing, revenue management, sales, marketing, and

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[4] *See* United/Lufthansa Case, Final Order 96-5-27 (Docket DOT-OST-1996-1116); United/Lufthansa/SAS Case, Final Order 96-11-1 (Docket DOT-OST-1996-1646); United/Lufthansa/SAS/Austrian Case, Final Order 2001-1-19 (Docket DOT-OST-2000-7828); United/Lufthansa/SAS/Austrian/bmi Case, Order 2003-6-39 and Order 2007-9-12 (Docket DOT-OST-2001-10575); United/Lufthansa/SAS/Austrian/bmi/Swiss/TAP/LOT/Air Canada, Final Order 2007-2-16 (Docket DOT-OST-2005-22922). *See also* United/Air Canada Case, Final Order 97-9-21 (Docket-DOT-OST-1996-1434).

[5] Joint Application at 2-3.

[6] Order 2008-10-3 (Oct. 8, 2008).

[7] Order 2008-11-8 (Oct. 8, 2008); Notice (Dec. 3, 2008); Order 2009-1-18 (Jan. 28, 2009).

[8] The Alliance Agreements are described in the Joint Application, page 2, footnote 2, and produced in Exhibit JA-1. Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 12/18/08 (updated confidentiality guidelines); Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 1/14/09 (updated confidentiality guidelines).

[9] *See* Joint Application, Exhibit JA-1 (Transatlantic Joint Venture Agreement). The terms of the A++ agreement are described in Joint Application at 6-7, 13-19.

financial settlement. They will share revenues according to a capacity-based formula that may be adjusted periodically. The goals of A++ are to expand the joint network, create operating efficiencies, enhance the competitiveness of the alliance members, and deliver consumer benefits. A++ aims to foster "metal neutrality" – a commercial environment in which joint venture partners share common economic incentives to promote the success of the alliance over their individual corporate interests. By pooling resources to improve the overall service offering, and by sharing gains and losses, the partners are able to harmonize the global network and become indifferent as to which of them collects the revenue and operates the aircraft on a given itinerary. They are then able to focus on gaining the customer's business by providing the best available fare and routing between two cities.

The Joint Applicants make a number of arguments in support of the proposed alliance, as follows. The planned cooperation will produce significant consumer benefits and operating efficiencies, help the alliance partners cope with volatile fuel prices, take advantage of the liberalized regulatory environment provided by the U.S.-EU Air Transport Agreement, and enhance inter-alliance competition, just as SkyTeam launches its own integrated joint venture.[10] Continental's network complements United's, Lufthansa's, Air Canada's, and those of the other partners, with relatively little overlap and accordingly modest increases in market share; therefore, the proposed alliance will not substantially reduce competition in any relevant market. Finally, while antitrust immunity is not necessary to achieve every public benefit envisioned by the proposed alliance, it is necessary to achieve what they consider the most important benefits, and the Joint Applicants will not go forward with the transaction without it.

C. Responsive Pleadings

The Joint Applicants submitted copies of letters from public officials, business leaders, and airport managers in support of the proposed alliance.[11] In addition, two comments from municipalities and business organizations in Houston and New Jersey were filed in support of the proposed alliance (the "Civic Parties").[12] The Civic Parties urge the Department to quickly approve the proposed alliance to help Continental and the other Star partners deal with rapidly changing economic conditions. The Civic Parties argue that the proposed alliance will enhance Continental's competitiveness, support the local economy, and improve the connectivity of the Houston and Newark hubs.

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[10] *See* Joint Application; Consolidated Reply (Dec. 15, 2009); Surreply and Motion for Leave to File (Nov. 10, 2008). We will grant the Joint Applicants' motion for leave to file.

[11] Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 2/24/09; Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 3/6/09; Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 3/17/09; Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 3/26/09; Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 4/3/09; Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 4/3/09.

[12] Comments of the City of Houston and the Greater Houston Partnership (Dec. 10, 2008); Reply of the New Jersey Parties (Dec. 15, 2008).

No party opposes the proposed alliance outright. Indeed, no party objects to the addition of Continental to the existing immunized alliance or the formation of A++. However, several parties challenge the nature and scope of the proposed cooperation.

The American Society of Travel Agents and the Interactive Travel Services Association (together, the "Travel Agents") express concerns about the applicants' plans to cooperate in the area of distribution and sales.[13] The Travel Agents argue that, if we approve the proposed alliance, we should limit the grant of immunity to prevent the alliance members from cooperating in the distribution of their products and services through independent travel agents. Without appropriate limits on distribution cooperation, the airlines may gain undue bargaining leverage versus travel agents, which will result in lower commissions, damage to the travel agent sector, and potential harm to consumers who will not enjoy the full benefits of booking through independent channels.

Delta expresses a number of concerns about the case and urges the Department to apply a rigorous standard to review the proposed alliance because it involves more than one U.S. carrier and substantial network overlap.[14] Delta argues that the proposed alliance is overly broad in scope and not adequately supported in the record. Therefore, Delta suggests that we limit the geographic scope of the proposed alliance to transatlantic markets only. In assessing the transaction, Delta believes the Department should consider that the proposed alliance is likely to reduce inter-gateway competition from the East Coast as the alliance partners potentially rationalize capacity between Continental's hub in Newark and United's hub in Washington (Dulles). Delta also asserts that the Joint Applicants' proposal to include immunized cooperation between two U.S. carriers in limited-entry markets should not be approved since it is contrary to DOT precedent and open-skies policy. Moreover, if the Department determines to approve the transaction, Lufthansa's investment in JetBlue must be relinquished as a condition of obtaining immunity with Continental.[15]

Porter Airlines addresses the U.S.-Canada market.[16] In the event the proposed alliance is approved, Porter argues that we should impose limitations on the immunity granted to preserve competition. Porter believes that the proposed alliance could reduce competition in several city pairs between the United States and Canada because of high market shares, changing circumstances in the airline industry that could lessen competition (such as mergers), slot

[13] Answer of the Travel Agents (Nov. 26, 2008); Reply of the Travel Agents (Jan. 16, 2009); Supplemental Answer of the Travel Agents (Feb. 6, 2009).

[14] Motion of Delta (Oct. 30, 2008); Motion for Leave to File and Reply of Delta (Nov. 7, 2008); Answer of Delta (Nov. 26, 2008); Supplemental Comments of Delta (Dec. 10, 2008); Corrected Comments of Delta (Dec. 24, 2008); Motion for Leave to File and Surreply of Delta (Dec. 24, 2008); Letter from Van der Bellen, Counsel for Delta, to Reynolds, Acting Assistant Secretary for Aviation and International Affairs, of 12/31/08; Motion to Re-Open the Record (Jan. 15, 2009); Supplemental Comments of Delta (Feb. 6, 2009). We will grant Delta's motions for leave to file.

[15] In addition, Delta has stated that insufficient record evidence and irregular procedures used by the Department violate the Administrative Procedure Act and preclude a proper judgment in this case. Delta's concerns have been addressed by subsequent submissions in the record, the extensions of the comment period, and our decisions on substantive issues in this proposed decision.

[16] Answer of Porter (Nov. 26, 2008).

constraints that limit new entry in New York, and aggressive pricing actions by the applicants in response to Porter's entry into the U.S.-Canada market.

III. DECISIONAL STANDARDS

As a general matter, we evaluate requests for antitrust immunity by analyzing the impact of the agreements on competition and the public interest. We will consider granting immunity if we find that the proposed transaction is, on balance, pro-competitive, pro-consumer, and consistent with our international aviation competition policy. While an open-skies regulatory framework is a predicate for our consideration of a grant of antitrust immunity, the existence of such a framework in no way guarantees a grant of immunity. We make our decision based upon the specific facts and circumstances of each case.

By statute, our review proceeds in two steps. The first is whether to approve the Alliance Agreements under 49 U.S.C. § 41309, for which we conduct a competitive analysis to determine that the agreements are not adverse to the public interest and do not violate the statute. In particular, we cannot approve agreements that substantially reduce or eliminate competition unless they are necessary to meet a serious transportation need or to achieve important public benefits, when that need or those benefits cannot be met or achieved by reasonably available alternatives that are materially less anticompetitive. The public benefits element requires consideration of, among other things, international comity and foreign policy factors. Under this part, a party opposing approval has the burden of proving that the agreement or request substantially reduces or eliminates competition and that less anticompetitive measures are available. On the other hand, the party seeking approval of the agreement or request has the burden of proving the transportation need or public benefits.

If the agreements are approved, the second step is whether to grant immunity under 49 U.S.C. § 41308. We have authority to exempt airlines from the antitrust laws to the extent necessary to allow the transaction to proceed, provided that we determine that the exemption is required by the public interest.

IV. TENTATIVE DECISION

A. Competitive Analysis Pursuant to Section 41309

The Alliance Agreements provide for commercial cooperation, improved efficiency, and enhanced ability of each airline partner to better compete in the global marketplace. While the parties to the agreements will retain their corporate identities and brands, they seek to offer seamless service to customers. Accordingly, the intended commercial effects of the Alliance Agreements are similar to those resulting from a combination of airline operations.

To determine whether such an arrangement substantially reduces competition, which we must do under § 41309, we apply the Clayton Act test, which is used to predict the competitive effects of a proposed merger.[17] In this context, the Clayton Act test requires us to consider whether the Alliance Agreements are likely to substantially reduce competition and facilitate the exercise of market power – that is, to allow the Joint Applicants to profitably charge supra-competitive prices or reduce service or quality below competitive levels in any relevant market. To determine whether an alliance is likely to create or enhance market power, we primarily consider whether the alliance would significantly increase market concentration, whether the alliance raises concerns about potential anticompetitive effects in light of other factors, and whether new entry into the market would be timely, likely, and sufficient either to deter or counteract a proposed alliance's potential for harm.

Continental will be a party to a series of alliance agreements that provide a framework for cooperation on a worldwide basis. Our analysis is limited to those markets in which Continental's services overlap with the services of the already-immunized alliance members. Focusing on those markets, we examine the competitive effects of the transaction at the regional, country-pair, and city-pair level, in keeping with past cases. In this case, it is necessary to consider two additional factors. First, four of the applicants – Air Canada, Continental, Lufthansa, and United – plan to launch the A++ joint venture, which provides for integrated and structured cooperation. A++ is limited, for the time being, to transatlantic markets, and it integrates a large portion of the participating airlines' networks and seeks to generate efficiencies far beyond what the Star partners have achieved in the past. Second, even though the proposed alliance is limited to international markets, Delta expresses concern that the transaction may harm U.S. domestic competition because it involves two U.S. carriers as well as a foreign partner, Lufthansa, which holds a limited equity investment in a third U.S. carrier. We will therefore consider whether additional safeguards are necessary to preserve domestic competition.

1. Regional Markets

The proposed alliance combines services in regional markets between the United States and Europe, Asia, the Middle East, and the Americas. The U.S.-Europe market is the largest of these regional markets, with the most total capacity offered by the Joint Applicants. The structure of the U.S.-Europe regional market is generally competitive. Approximately 40 airlines provide scheduled service.[18] Five major U.S. airlines, plus Delta's Northwest subsidiary, operate scheduled passenger flights from their hubs, and several U.S. airlines offer additional code-share services with foreign alliance partners.

As shown in Table 1 below, the proposed alliance creates a share shift of 8.5 percentage points, equal to Continental's share in the transatlantic market. The immunized Star carriers move from having the second largest share of the market, at 23.2%, or 5.2 percentage points less than SkyTeam, to having the largest share at 31.7%, or 3.3 percentage points more than SkyTeam. The state of inter-alliance competition remains largely unchanged. The transaction

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[17] *See, e.g.*, Acquisition of Northwest/Wings Holdings, Inc., Order 92-11-27 at 13 (Docket 46731); Delta/ Northwest/Air France/KLM/Alitalia/Czech Case (SkyTeam II), Show Cause Order 2008-4-17 at 5 (Docket DOT-OST-2007-28644).

[18] Official Airline Guide ("OAG") Scheduling Data for April 2009.

does not materially alter the current competitive landscape or increase overall market share to any significant degree.

Table 1
Onboard Share in the U.S.-EU Market[19]

Pre-Transaction	Share	Post-Transaction	Share
Air Canada, Austrian, bmi, Lufthansa, LOT, SAS, Swiss, TAP, United	23.2%	Air Canada, Austrian, bmi, Lufthansa, LOT, SAS, Swiss, TAP, United, Continental	31.7%
Air France, Alitalia, Czech, Delta, KLM, Northwest	28.4%	Air France, Alitalia, Czech, Delta, KLM, Northwest	28.4%
British Airways	10.8%	British Airways	10.8%
American, Finnair	8.9%	American, Finnair	8.9%
Continental	8.5%		
Virgin Atlantic	6.7%	Virgin Atlantic	6.7%
US Airways	4.2%	US Airways	4.2%
Aer Lingus	2.4%	Aer Lingus	2.4%
Iberia	1.9%	Iberia	1.9%
Other traffic	5.0%	Other traffic	5.0%
Total	100.0%	**Total**	100.0%

2. Country-Pair Markets

There are several country-pair markets in which Continental's services overlap with those of the existing immunized alliance partners.[20] Using a variety of data sources, we can assess changes in market structure that are likely to occur as a result of the proposed alliance. The historical traffic data collected by the Department, also known as T-100 data, are a 100-percent sample of all onboard traffic between the United States and any point served nonstop by a carrier. These data are limited because they only provide information on the number of onboard passengers on nonstop flights between the United States and the foreign country. The data do not definitively provide the origin and destination of the passenger and therefore can overstate or understate the true nature of the country-pair market share. In general, onboard data are likely to

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[19] DOT T-100 and T-100(f) nonstop segment data for the 12 months ended October 2008. We define the U.S.-EU market to include scheduled airline operations for traffic between points in the United States and points in all 27 Member States of the European Union, plus Norway and Switzerland. Competitors are defined as independent airlines or groups of airlines operating with antitrust immunity. Competitors must have 1% market share to be listed. The term "market share" is shorthand for "nonstop segment passenger share," and should not be confused with the existence of a relevant antitrust market. The market shares of KLM, Lufthansa, and Swiss include traffic carried by Privatair, which operates flights for all three airlines.

[20] Europe: Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal, Sweden, Switzerland, and the United Kingdom; Asia/Middle East: China, Hong Kong, India, Israel, and Japan; and the Americas: Argentina, Aruba, Bermuda, Brazil, Canada, Costa Rica, Mexico, and the Netherlands Antilles.

overstate an alliance's presence in a country-market if that alliance has nonstop trunk routes into those countries from the United States. For example, a Star Alliance flight from Washington to Frankfurt will have many onboard passengers connecting beyond Frankfurt to points outside of Germany. T-100 data, however, assign all of these connecting passengers to Germany, thus inflating Star's share in the U.S.-Germany country-pair market. Conversely, onboard data tend to understate the presence of an alliance in country markets where another alliance has nonstop trunk routes into those countries. Using the Washington-Frankfurt example, those Star Alliance passengers connecting in Frankfurt to points in Italy would not be assigned to U.S.-Italy, thus understating Star's U.S.-Italy country-pair market share.

On the other hand, booking data, also known as Market Information Data Tapes (MIDT) data,[21] capture bookings generated through global distribution systems to identify passenger itineraries, including the origin and destination points, which are important not only in assessing each alliance's country-market share but also in analyzing worldwide alliance traffic flows and share gaps. In this way, booking data better reflect the competitive dynamic among network airlines and alliances. While booking data represent a significant portion of all bookings, they are not a 100-percent sample as they do not include bookings made directly with the airline, including through an airline's website. In addition, the data are only booked passengers, not actual passengers flown.

Given the different characteristics of T-100 and MIDT data, the Department must analyze both data sources to better assess country-market shares among alliances. We tentatively determine that the proposed alliance is likely to enhance competition in several important markets. With Continental, Star becomes a more competitive alliance in markets where oneworld or SkyTeam have a strong presence. For all U.S.-EU markets, the proposed alliance increases inter-alliance competition in five of the ten largest country-pair markets: France, Ireland, Italy, the Netherlands, and Spain. At the same time, however, the immunized Star carriers would increase their existing strength to varying degrees in six Star country-pair markets: Denmark, Germany, Norway, Portugal, Switzerland, and Sweden. The remaining 18 countries experienced either 1) the shifting of country-market share from one secondary alliance to the other secondary alliance, 2) the switching in order between the alliance with the largest country-market share and the alliance with the next-largest country-market share, or 3) a small/negligible share change. The shifting of country-market share from one secondary alliance to another secondary alliance occurs in the United Kingdom as Continental switches from SkyTeam to Star while oneworld remains the leading alliance. In two countries, Belgium and Greece, SkyTeam shifts from the number one alliance to the number two alliance while Star shifts from number two to number one. Finally, in 15 remaining countries, including Austria and Poland (the home countries of two immunized Star carriers), the shift in market share is negligible as Continental's inclusion into Star has little market share effect.[22]

As stated, the proposed alliance increases Star's strength to varying degrees in a number of transatlantic markets in which Star carriers already have a strong presence; a similar impact

[21] [Confidential] Joint Application, MIDT data.

[22] Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, and Slovenia.

occurred in existing strong SkyTeam markets after the recent SkyTeam decision. In these markets, the proposed alliance results in high market share or a significant share shift in Star's favor. The shift occurs when Continental's market share is added to the larger share held mainly by European partners that have long operated the majority of the long-haul service from their homelands. These shares do not, however, capture some important aspects of the competitive environment. Above all, they overstate the influence of competitors offering nonstop services in the gateway-to-gateway markets that link the carriers' behind and beyond markets. Other carriers and alliances offer connecting services that, for most travelers, discipline the fares and services offered by the nonstop carriers. In addition, the recent grant of antitrust immunity to SkyTeam made that alliance more competitive in traditional Star U.S.-EU country-markets, while the inclusion of Continental into Star appears to balance some of the strength SkyTeam gained in its U.S.-EU home-country markets with the granting of its application last year. In summary, inter-alliance competition is either enhanced or unaffected by Continental's inclusion in immunized Star in countries where surveyed passengers represent almost three-quarters of the estimated origin and destination traffic between the United States and the European Union.

The addition of Continental does not significantly increase Star's share in the U.S.-Canada market. Moreover, the proposed addition of Continental to the existing Star Alliance does not appear to result in high market shares or significant share shifts in markets between the United States and Asia and the Middle East. However, with the addition of Continental, Star increases inter-alliance competition to varying degrees in the overlapping markets in Mexico, several Caribbean islands and in Latin America, including Argentina, Brazil, Colombia, Costa Rica, Peru, and Venezuela. Therefore, inter-alliance competition is largely enhanced or unaffected by the proposed transaction in the non-EU overlapping markets.

3. City-Pair Markets

The proposed alliance does not include any nonstop overlaps in international markets between Continental and United. However, there are fourteen city-pair markets in which Continental's services overlap on a nonstop basis with those of the other existing immunized alliance partners. Six such routes involve transatlantic markets: New York-Frankfurt (Continental and Lufthansa), New York-Zurich/Geneva (Continental and Swiss), New York-Stockholm/Copenhagen (Continental and SAS), and New York-Lisbon (Continental and TAP). Eight routes involve U.S.-Canada (transborder) markets: New York-Toronto/Montreal/Vancouver/Ottawa/Halifax, and Houston-Calgary/Toronto, and Cleveland-Toronto (Air Canada and Continental).[23]

When global network carriers combine operations, nonstop overlaps are common, especially on hub-to-hub routes. The potentially serious anticompetitive effects of reducing competition on these routes may be offset to some extent if the affected city pairs are served by competing carriers on a nonstop or connecting basis. Additionally, efficiencies created by the transaction in

[23] According to the Department's analysis of OAG Scheduling data, the New York-Vancouver route overlaps on a seasonal basis only.

other markets may be considered if a remedy is not available to address the loss in competition while still preserving the benefits of the transaction.[24]

One remedy is the "carve out," which prohibits airline partners from coordinating the sale of air transportation to a narrowly defined group of passengers, particularly time-sensitive travelers, who are more likely to rely on nonstop flights and premium service options and who are the most likely to feel the effects of reduced competition. We evaluate whether carve outs are necessary on a case-by-case basis. In two prior cases involving the existing immunized alliance, we determined that carve outs were necessary on four select routes: Chicago-Frankfurt, Washington-Frankfurt, Chicago-Toronto, and San Francisco-Toronto. In the Chicago/Washington-Frankfurt routes, Lufthansa and United are prohibited from coordinating fares for unrestricted coach, business, and first class traffic for U.S. point-of-sale.[25] In the Chicago/San Francisco-Toronto markets, Air Canada and United are prohibited from coordinating fares for local U.S. point-of-sale traffic.[26]

The Joint Applicants argue that the proposed alliance will promote competition, despite the nonstop overlaps.[27] In each overlap market, the Joint Applicants argue that they face strong competition from major industry participants. Consequently, they ask us to remove existing carve outs and refrain from imposing new ones in any of the 14 nonstop overlap markets.[28] Carve outs, they insist, impose costly burdens on the carriers that are not justified by the supposed benefits to consumers. The applicants emphasize that the carve outs affect a relatively small number of passengers and lack a rational basis where competition is increasing and open-skies agreements are providing ample opportunities for new entrants to discipline the incumbent carriers.[29]

In contrast, Delta and Porter advocate retaining the existing carve outs and adding others. Delta argues that carve outs are necessary to mitigate harm because the proposed alliance will have a dominant market share in every overlap market.[30] Where the overlaps involve carriers that are not parties to the A++ agreement, Delta advocates carve outs because it believes there is no basis to allow unfettered cooperation. At a minimum, Delta asks the Department to impose carve outs in the Houston-Toronto, Houston-Calgary, and Cleveland-Toronto markets – where the possibility of new entry is allegedly less likely – until a joint venture is presented that covers those routes.[31]

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[24] The Department of Justice follows this approach in reviewing mergers. *See* Horizontal Merger Guidelines § 4, footnote 36.

[25] United/Lufthansa Case, Final Order 96-5-27, Appendix A (Docket DOT-OST-1996-1116).

[26] United/Air Canada Alliance Case, Final Order 97-9-21, Appendix A (Docket DOT-OST-1996-1434).

[27] Joint Application at 80-85.

[28] Joint Application at 85-93; Consolidated Reply of the Joint Applicants at 27-32 (Dec. 15, 2008).

[29] Joint Application at 85; Consolidated Reply of the Joint Applicants at 27-32 (Dec. 15, 2008).

[30] Answer of Delta at 12-14 (Nov. 26, 2008).

[31] Answer of Delta at 13-14 (Nov. 26, 2008).

Porter argues that the proposed alliance will reduce competition on routes between the United States and Toronto. Porter asks us to maintain the existing carve outs, particularly in the Chicago-Toronto market where the applicants are aggressively pricing in response to Porter's services, and to impose a new carve out in the New York-Toronto market, where there are constraints on capacity.

We have considered the arguments raised by interested parties and examined the affected city-pair markets. We tentatively find that each of the nonstop overlap markets will continue to have adequate competition on a nonstop or connecting basis. Seven of the routes are served by competing airlines on a nonstop basis.[32] Where the transaction materially reduces the number of competitors, as it does in a small number of markets, the particular facts and circumstances of this case indicate that consumers will not be harmed.

In transatlantic markets, the affected city pairs are subject to close cooperation under a comprehensive joint venture. A++ covers all transatlantic routes, regardless of whether they are served on a nonstop or connecting basis. By bringing all their capacity within the joint venture, participants seek to achieve true integrative benefits and efficiencies that will be passed on to consumers in the form of improved, more affordable travel options. For example, the applicants target a 20-50% cost savings in sales, marketing, and distribution, as well as reductions in operating and fixed costs from incremental traffic flows, higher load factors, common pricing, joint scheduling and route planning, and harmonization of information technology systems.[33] We would not expect the applicants to be able to achieve those efficiencies, or to pass on those cost savings, if they were prevented from coordinating the full range of their services under the joint venture, including services for time-sensitive travelers.[34] For this reason, we will not impose new carve outs in transatlantic markets. Further, we will remove the two existing carve outs that are subject to cooperation under the joint venture – namely, Chicago/Washington-Frankfurt – once the joint venture is implemented.

Only one nonstop overlap involves parties to the A++ agreement (New York-Frankfurt). The other five involve Continental and European airlines that are not parties to the A++ agreement (New York-Copenhagen/Geneva/Lisbon/Stockholm/Zurich). We tentatively believe that

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[32] In the New York-Frankfurt market, Singapore and Delta provide nonstop service from New York JFK. In the New York-Zurich market, American provides nonstop service. In the New York-Stockholm market, Malaysian provides service from Newark Liberty. In the New York-Toronto market, American and Delta provide nonstop service between New York JFK and Toronto Pearson, American provides service between New York LaGuardia and Toronto Pearson, and Porter provides nonstop service between Newark Liberty and Toronto City Centre. In the New York-Montreal market, American and Delta provide nonstop service from New York JFK and American provides some additional service from New York LaGuardia. In the New York-Vancouver market, Cathay Pacific provides service from New York JFK. In the New York-Halifax market, American and Delta provide nonstop service from New York JFK. Numerous carriers provide connecting services in all of the above markets. OAG Schedule Data for April 2009.

[33] Joint Application at 41-46, Appendix B at 5-6.

[34] *Cf.* Delta/Northwest/Air France/KLM/Alitalia/Czech Case (SkyTeam II), Show Cause Order 2008-4-17 at 10 (Docket DOT-OST-2007-28644) (explaining the Department's rationale for removing select carve outs for the SkyTeam alliance).

imposing carve outs in these markets is not appropriate or necessary. These five nonstop markets are "bridge" routes linking the largely complementary networks of Continental and its smaller European partners. Imposing carve outs on nonstop service would likely prevent the alliance from improving connections over the joint network. It would be harder for the alliance to maximize the value of the more specialized, regional networks of SAS, Swiss, and TAP, thereby disadvantaging the smaller carriers and jeopardizing potential benefits for consumers.

In transborder markets, the competitive structure resembles the U.S. domestic market in several important ways. Significantly shorter stage lengths create a less costly and commercially risky environment, because the markets can be readily served by narrow-body or regional aircraft. Consequently, low-cost carriers and major airlines based on both sides of the border have introduced new services, and are poised to introduce more in the future, from primary or secondary airports. Where new entrants encounter difficulties in obtaining slots at New York or Canadian airports, incumbent carriers are well positioned to launch competing services should the proposed alliance attempt to increase prices above, or reduce service levels below, competitive levels. We thus tentatively believe that new carve outs are not necessary in these particular transborder markets.

While new carve outs are not necessary, we have tentatively decided not to remove the carve outs in the Chicago/San Francisco-Toronto markets at this time. Since the basis for removing the carve outs in transatlantic markets depends upon the existence of true integrative benefits, as it did in the recent SkyTeam case, we think that it is appropriate to maintain the *status quo*.[35] The Joint Applicants have not demonstrated any integrative benefits in the subject markets, and they have not persuaded us to reverse our earlier findings from the United/Air Canada case.[36]

We tentatively find that the proposed alliance is pro-competitive, despite the nonstop overlaps. Therefore, we tentatively decide to remove existing carve outs in the Chicago/Washington-Frankfurt market, when A++ is implemented, and to refrain from imposing any new carve outs. However, we tentatively decide to retain the existing carve outs in the Chicago/San Francisco-Toronto markets.

4. Domestic Competition

The proposed alliance facilitates cooperation in international markets. Since two of the applicants are U.S. carriers – Continental and United – the Alliance Agreements must be carefully structured to preserve competition in domestic markets and specifically to avoid any inadvertent sharing of competitively sensitive information between the alliance partners that could undermine competitive forces on domestic routes.

Due to the integrated nature of airline networks, the alliance partners must have detailed safeguards in place to preserve competition in U.S. domestic markets. Passengers who purchase international itineraries on Continental or United and who travel from behind-gateway points in

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[35] *See* Delta/Northwest/Air France/KLM/Alitalia/Czech Case (SkyTeam II), Show Cause Order 2008-4-17 at 10 (Docket DOT-OST-2007-28644).

[36] United/Air Canada Case, Final Order 97-9-21 (Docket DOT-OST-1996-1434).

the United States must connect at domestic gateways before traveling to their final destinations (*e.g.*, Des Moines-Chicago-Dusseldorf). The domestic legs of the international itineraries (*e.g.*, Des Moines-Chicago) are known as the Domestic Portion of International Journeys, or DPIJs. For commercial reasons, Continental and United plan to include DPIJ traffic within the scope of the proposed alliance, in particular the A++ joint venture.[37] Thus, while the applicants plan to limit their cooperation to foreign air transportation, they will in fact coordinate certain fare and capacity information for DPIJ traffic. To the extent the coordination on DPIJ traffic "spills" to other domestic operations – allowing one carrier to deduce sensitive information about its domestic competitors – competitive harm may result.

To reduce the likelihood of spill, Continental and United have drafted confidentiality guidelines to limit information sharing between them, and they have submitted the guidelines for the record.[38] The guidelines clarify that the scope of the Alliance Agreements is limited to foreign air transportation and establish detailed rules for exchanging information.

We are concerned about the potentially serious competitive harm that may result from the immunized cooperation of two U.S. carriers, even if the cooperation is limited to foreign air transportation. However, because we are not willing to arbitrarily limit the number of U.S. carriers that may join an immunized alliance, we must assess the risk of harm on a case-by-case basis and weigh it against the potential public benefits. The risk of spillover is a common by-product of joint ventures in any setting; therefore, it is routine for venture participants to devise protocols to prevent improper sharing of information, while allowing the public benefits of the transaction to be realized.

Based on the particular circumstances of this case, we tentatively find that the benefits of the proposed alliance, as discussed elsewhere in this tentative decision, outweigh the comparatively small risk of harm that could occur in domestic markets. Essential to our tentative determination are the applicants' confidentiality guidelines, as revised to address issues discussed by the applicants and the U.S. Department of Justice ("DOJ").[39] We have tentatively decided to require Continental and United to adhere to the confidentiality guidelines submitted and file any material amendments with the Department of Transportation on an ongoing basis.

Additionally, the Joint Applicants have submitted language to clarify the applicability of the antitrust laws to the proposed alliance.[40] According to the language, which was also reviewed by DOJ, the U.S. antitrust laws will remain applicable to air transportation provided solely

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[37] *See* Joint Application, [Confidential] Exhibit JA-1 (Transatlantic Joint Venture Agreement, Section I).

[38] Joint Application at 93, [Confidential] Exhibit JA-2.

[39] Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 12/18/08 (noting that revisions to the confidentiality guidelines address all issues raised by the Department of Justice's Antitrust Division regarding domestic competition between Continental and United). *See also* Answer of Delta, [Confidential] Appendix at 1-3 (Nov. 26, 2008).

[40] Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 12/18/08 (stating that the Joint Applicants would agree to language concerning the applicability of the U.S. antitrust laws).

within the United States. We tentatively decide to incorporate the language in Appendix A to this Order.

5. Lufthansa's Investment in JetBlue

In January 2008, Lufthansa acquired a 19 percent interest in JetBlue Airways, as well as two seats on JetBlue's Board of Directors.[41] Delta suggests that this investment raises pressing concerns about the potential for the Star carriers to influence domestic competition and the sharing of competitively sensitive information.

Delta argues that Lufthansa should not be allowed to simultaneously hold a financial stake in JetBlue while also engaging in an immunized alliance with Continental, a competitor of JetBlue.[42] Delta theorizes that Lufthansa will gain access to competitively sensitive information from both JetBlue and Continental, which may give Lufthansa the incentive to share the information or exert influence over its partners' commercial decisions, which in turn could potentially lessen competition among a number of U.S. carriers. Delta concludes that Lufthansa should relinquish or restructure its investment in JetBlue as a condition of obtaining immunity with Continental.

The Joint Applicants strongly oppose any condition that would require Lufthansa to relinquish or restructure its investment. They state that both DOT and DOJ reviewed Lufthansa's acquisition and allowed it to proceed without conditions. In any event, the applicants argue that Lufthansa has no ability or incentive to control or influence JetBlue's competitive behavior vis-à-vis Continental or United. Similarly, Lufthansa has no ability to control Continental or vice versa.

On January 14, 2009, the Joint Applicants submitted a second set of confidentiality guidelines on the investment issue. The Joint Applicants state that the guidelines are intended to address domestic antitrust issues regarding Lufthansa's minority ownership interest in JetBlue, including Lufthansa's participation on JetBlue's board of directors, in relation to the proposed alliance.[43] Delta is not satisfied with the guidelines, arguing that the only suitable remedy is relinquishment or restructuring of Lufthansa's investment.[44] Likewise, the Travel Agents argue

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[41] Press Release, JetBlue Airways, Lufthansa and JetBlue Complete Stock Purchase Transaction (Jan. 22, 2008), *available at* http://investor.jetblue.com/phoenix.zhtml?c=131045&p=irol-newsArticle&ID=1098658&highlight=. *See also* Motion of Delta at (Oct. 30, 2008); Answer to Motion of Delta (Nov. 3, 2008); Reply of Delta (Nov. 7, 2008); Answer of Delta (Nov. 26, 2008); Supplemental Comments of Delta (Dec. 10, 2008); Consolidated Reply of the Joint Applicants at 32-40 (Dec. 15, 2008); Corrections to Reply and Answer of Delta (Dec. 24, 2008).

[42] Answer of Delta at 15 (Nov. 26, 2008). *See also* Motion of Delta (Oct. 30, 2008); Reply of Delta (Nov. 7, 2008); Letter from Van der Bellen, Counsel for Delta, to Beard, Chief of DOT Dockets, of 12/14/08 (Dec. 24, 2008) (correcting Delta's answer and reply); Supplemental Comments of Delta (Dec. 10, 2008); Motion for Leave to File and Surreply of Delta (Dec. 24, 2008); Motion to Re-Open the Record (Jan. 15, 2009); Supplemental Comments of Delta (Feb. 6, 2009). We will grant the motions for leave to file.

[43] Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 1/14/09.

[44] Supplemental Comments of Delta at 2-6 (Feb. 6, 2009).

that the new guidelines are insufficiently detailed and provide no basis upon which DOT could draw conclusions about competitive effects.[45]

We have reviewed the guidelines and considered the arguments presented. We tentatively find that no structural remedies are necessary. We have already addressed the issue of influence over domestic competition. In January 2008, the Department conducted a thorough review of the Lufthansa-JetBlue transaction under our established procedures to examine substantial changes in the ownership of U.S. carriers.[46] We determined that JetBlue remained a citizen of the United States, under the actual control of U.S. citizens. No evidence has been provided to call that determination into question. Similarly, we have examined the Alliance Agreements in the context of this case, and it is clear, on the face of the agreements, that the applicants will remain independent entities with no ability to exercise control over each other.

Regarding the sharing of competitively sensitive information, Lufthansa's limited investment obviously gives it a financial stake in JetBlue's business. While there is nothing inherently anti-competitive about that arrangement, we recognize that Lufthansa could potentially serve as a conduit for confidential information that, if improperly disclosed, could potentially lessen competition. The confidentiality guidelines submitted by the applicants and reviewed by DOJ address this concern to our satisfaction. We tentatively conclude that the Joint Applicants must adhere to the confidentiality guidelines and submit any material amendments to those guidelines to the Department of Transportation on an ongoing basis.

6. Competition at U.S. Gateways on the East Coast

As a condition of obtaining approval for the proposed alliance, Delta suggests that we should require Continental and United to commit to maintaining all of their current transatlantic service from Newark and Dulles. Delta's theory is that the two international gateways serve the same catchment area, and are therefore likely to see rationalizations and reductions of service under A++.[47]

We tentatively find no support for Delta's position. It has been our consistent policy not to dictate how applicants should allocate capacity or optimize their networks, including SkyTeam's, with its two recent mergers. In this case, the Joint Applicants have stated their plans to maintain their existing services at Newark Liberty and Dulles.[48] Recognizing that circumstances sometimes require carriers to adjust their commercial plans, we have analyzed the competitive effects of potential rationalization by Continental and United. We tentatively find that integrative benefits of A++ are likely to improve the quality of service for passengers traveling on Continental and United to Europe. To the extent that circumstances require the applicants to rationalize or reduce services, the joint venture is likely to create efficiencies that help to preserve more services and benefits than would otherwise be possible.

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[45] [Confidential] Supplemental Comments of the Travel Agents at 4 (Feb. 6, 2009).

[46] *See* 14 C.F.R. § 204.5.

[47] Answer of Delta at 14-15 (Nov. 26, 2008).

[48] Answer of the Joint Applicants at 5-6 (Nov. 3, 2008); Consolidated Reply of the Joint Applicants at 41 (Dec. 15, 2008).

7. Tentative Conclusions

We have carefully analyzed the impact of the proposed alliance on regional, country-pair, city-pair, and domestic markets. Given the large overall size of the proposed alliance, and the possibility of service reductions as a result of hub rationalization, it is critical that the proposed alliance operate within a liberalized regulatory framework that enhances competition and promotes new entry. "[A]s alliance networks consolidate into fewer but larger groups, the existence of an open-skies framework covering geographic areas that are broader than the traditional country-pair markets becomes all the more important and enhances competition."[49] Many markets affected by this case are governed by the U.S.-EU Air Transport Agreement, which was provisionally applied on March 30, 2008. This regional agreement enhances competition in new ways by facilitating entry by duly authorized carriers on any routes between the United States and the European Union (with open intermediate and beyond rights). New entry is no longer limited to traditional country-pair markets; rather, it is more open than ever to new business models that could discipline the services of incumbent carriers with strong regional hubs.

In light of all the factors discussed above, we tentatively find that the proposed alliance will not substantially reduce or eliminate competition, provided that transatlantic markets remain governed by a regional open-skies agreement that promotes new entry regardless of national borders. In sum, we tentatively see no basis upon which the Joint Applicants could, as a result of this transaction, impose and sustain supra-competitive prices or reduce service levels below competitive levels. These considerations support the tentative conclusion that the proposed alliance is not adverse to the public interest and should therefore be approved.

B. Public Interest Analysis and Discussion of Antitrust Immunity Pursuant to 41308

Our competitive analysis tentatively determined that the Alliance Agreements were not likely to substantially reduce competition using Clayton Act standards. It is not our policy, however, to confer antitrust immunity simply on the grounds that agreements do not violate the antitrust laws. We are only willing to grant immunity if the parties to agreements would not otherwise go forward without it, and if we find that the public interest requires that we grant antitrust immunity.

The Joint Applicants argue that they will not attempt to achieve the full efficiency benefits of the transaction without a grant of immunity. Immunity is necessary, they say, to exchange competitively sensitive data to finalize the revenue sharing terms of A++. If they were to go forward otherwise, they believe they would be exposed to a continuing risk of legal challenge by third parties.[50]

[49] United/Lufthansa/SAS/Austrian/LOT/TAP/Swiss/Air Canada Case, Show Cause Order 2006-12-17 at 9 (Docket DOT-OST-2005-22922).
[50] Joint Application at 12, 29-30, 97-99.

We do not accept such statements at face value.[51] However, the particular circumstances of this case support the conclusion that the applicants would not go forward without immunity, leaving many of the potential benefits of their cooperation in doubt. The proposed alliance involves multiple large carriers, including two U.S. carriers, combining their international operations on a scale not previously attempted by the applicants. The specific terms of A++, with its emphasis on metal neutrality, create a risk of antitrust litigation. Given the substantial progress of the applicants to agree on the terms of the complex venture, we are tentatively persuaded that antitrust immunity is necessary for the implementation of the Alliance Agreements and the realization of public benefits.

1. Benefits of the Proposed Alliance

Although we may approve an agreement under § 41309 if we find that those agreements are "not adverse" to the public interest, the subsequent decision whether to grant antitrust immunity under § 41308 is discretionary. We may grant immunity only if we determine that it is "required by" the public interest. We have "always recognized that the public interest standard in [§ 41308] is a much more stringent standard than [§ 41309's] public interest standard."[52]

The Joint Applicants argue that the proposed alliance will generate substantial benefits for consumers, airline employees, and the participating carriers.[53] Since Continental is acceding to the existing immunized core of Star, it seeks the same authority already held by its prospective immunized partners, and argues that any limitations on its authority vis-à-vis its partners would place it at a comparative disadvantage and reduce the efficiencies of the alliance. To provide context, the applicants explain that Continental has made a strategic decision to join an immunized alliance in order to cope with challenging economic conditions and develop a truly global network for its customers. The applicants contend that A++ will provide for integrated and structured coordination of capacity, pricing and inventory management that will produce the most significant benefits as well as serve as a model for the applicants to launch more joint ventures in other regions of the world.[54] Following the recent grant of immunity to SkyTeam, the applicants believe the proposed alliance requires similar treatment.

The Joint Applicants point to numerous public benefits: (1) an expanded network, serving many new cities; (2) new online service, which includes the likelihood of new routes and expanded capacity on existing routes; (3) enhanced service options such as more routings, reduced travel times, expanded nonstop service in select markets, new fare products, and integrated corporate contracting and travel agency incentives; (4) enhanced competition due to the addition of a major new gateway, Newark, as well as the elimination of multiple mark-ups on

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[51] *See, e.g.*, Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Show Cause Order 2008-4-17 at 13 (Docket DOT-OST-2007-28644).

[52] Northwest/KLM Case, Order 93-1-1 at 11 (Docket 48342). *See also* Delta/Northwest/Air France/KLM/Alitalia/Czech Case (*SkyTeam I*), Order 2005-12-12 at 32 (Docket DOT-OST-2004-19214); United/Lufthansa/Austrian/SAS/LOT/Swiss/TAP/Air Canada Case, Order 2006-12-17 at 15 (Docket DOT-OST-2005-22922).

[53] Joint Application at 7-12, 24-54.

[54] Joint Application at 13-19.

code-share segments and more vigorous competition between the alliances; (5) cost efficiencies; and (6) strengthened financial position of the carriers. Additionally, the Civic Parties state that the proposed alliance will provide substantial economic benefits to communities in Texas and New Jersey.

No party challenges these public benefits directly. Delta argues that a number of aspects of the application overreach what we have endorsed in our recent public interest findings and could cause harm to consumers. Delta is primarily concerned about the scope of the immunity request – consisting of geographic markets that are not subject to cooperation under a joint venture agreement – and the applicants' plans to coordinate in so-called "limited-entry" markets, such as the United States to China market, where there are no open-skies agreements in effect. The Travel Agents argue that the applicants' plans to cooperate in the area of distribution and sales are contrary to the public interest.

We believe that the applicants make a strong showing that substantial public benefits are likely to result from immunized cooperation. The applicants explain in detail how they will expand the existing immunized alliance to incorporate the largely complementary services of Continental. The existing Atlantic Plus arrangement between Lufthansa and United provides a base for launching an expanded, integrated joint venture at the core of the proposed alliance. A++ pools resources to achieve substantial efficiencies and cost savings that will help Continental and the other participants manage cyclical changes in the industry to preserve existing services, with a view towards growing capacity and enhancing competition between carriers and alliances. The carriers are not likely to achieve the efficiencies and cost savings on their own; an integrated economic benefit sharing arrangement is needed to provide the incentive for the carriers to invest the significant resources necessary to create additional consumer benefits. By sharing risk and optimizing the joint network, the alliance members will likely accelerate the introduction of new capacity, give consumers more travel options and shorter travel times, and reduce fares at the margin, due to the elimination of multiple mark-ups. Antitrust immunity is well suited to enable carriers to achieve merger-like efficiencies and deliver benefits that would not otherwise be possible. Thus, we tentatively conclude a grant of immunity is appropriate in this case.

Of course, the Joint Applicants have not yet implemented the A++ joint venture. They must still negotiate a revenue sharing formula. Many public benefits depend upon that negotiation reaching a prompt conclusion. Therefore, we tentatively find that the public interest requires us to limit the duration of the immunity, unless and until the Joint Applicants implement A++. This condition is explained in a later section.

2. Scope of the Proposed Alliance

We have considered arguments to limit the scope of the proposed alliance. The primary basis for Delta's objection is that the applicants do not have joint venture agreements in place on all routes that they might jointly serve. Without such agreements, Delta asserts that a worldwide grant of immunity is premature.

The Department does not require that airlines negotiate joint ventures covering all potential geographic markets to obtain immunity. It does, however, require applicants to submit their plans in enough detail to facilitate a complete competitive and public benefits analysis of a proposed alliance. In this case, we have enough information to analyze the alliance plans. Most of the applicants have been operating the immunized alliance for years. Adding Continental to the alliance does not require them to reconcile mutually exclusive benefit-sharing arrangements, as the SkyTeam applicants would have had to do in 2004, when they sought to merge two immunized alliances without a second-stage agreement to explain how benefits would be passed on to consumers.

In contrast, A++ expands on an existing template to provide for more detailed, integrated, and structured cooperation in many countries. Because the Star carriers already operate with worldwide immunity obtained in prior cases, restricting the scope of the Alliance Agreements at this juncture would primarily serve to disadvantage Continental and its customers. No party has shown a persuasive reason why Continental should be disadvantaged, or, alternatively, why we should take more expansive actions to rescind existing authority held by Star or other alliances.[55]

Delta also objects to the proposed alliance on the basis that it could operate in limited-entry markets where there is no open-skies agreement. Delta's characterization of the Department's policy is incorrect. The predicate for our consideration of this case is open skies between the United States and the homeland of the foreign carrier-applicant, not for every third-country destination that might be served. We have consistently allowed cooperation in third-country markets, even in the absence of an open-skies relationship between the United States and the third country. Indeed, the Department has allowed cooperation in some restrictive markets as a means of introducing competitive forces and encouraging additional liberalization. Of course, we recognize Delta's concern about the potential scarcity of entry opportunities in some markets. In the particular circumstances of this case, however, we will not jeopardize the network benefits of the proposed alliance by limiting the points that can be served, without stronger evidence of competitive harm.

Based on the discussion above, we tentatively find that the proposed alliance should not operate with restrictions on geographic scope.

The Travel Agents object to the plans by the proposed alliance to cooperate in sales and distribution. They state that the proposed alliance will allow airlines to achieve "monopsony power," thereby forcing independent travel distributors to accept lower prices for their

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[55] A++ is similar to the integrated joint venture that Delta and its partners now have authority to launch as a result of their second effort to merge the existing alliances in 2007. *See* Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Final Order 2008-5-32. *See also* Northwest/KLM Case, Final Order 93-1-11 (Docket 46371); Delta/Air France/Alitalia/Czech Case, Final Order 2002-1-6 (Docket DOT-OST-2001-10429); Delta/Air France/Alitalia/Czech/Korean Case, Final Order 2002-6-18 (Docket DOT-OST-2002-11842); Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Final Order 2008-5-32. Construed together, these authorities provide SkyTeam carriers with the same worldwide authority that Delta objects to us granting in this case.

services.[56] While we recognize the Travel Agents' concern that a grant of immunity may be used to collectively negotiate with travel agents, we believe it is necessary to incorporate marketing, sales, and certain distribution activities in the grant of immunity for consumers to realize the full benefits of the alliance.[57] Many of the public benefits depend upon an integrated joint venture that makes efficiencies possible in marketing, sales, and distribution.

Therefore, we tentatively find that the proposed alliance should not operate with special restrictions on distribution or sales.

3. Annual Reporting

Previous antitrust immunity cases contain reporting requirements: the immunized carriers must provide traffic data, submit new implementing agreements or material changes to existing agreements on an ongoing basis, and re-file all of the alliance agreements within five years of receiving their final authority.[58] However, given the size and complexity of the proposed alliance, we think the public interest requires additional reporting to ensure that public benefits are being realized. We tentatively find that the Joint Applicants should file annual reports to the Department that describe their progress in implementing the Alliance Agreements and discuss the specific benefits that are resulting from the immunized cooperation. We explain the reporting requirements in more detail in the next section of the order.

C. Tentative Conditions

In this section, we explain and summarize the proposed conditions that were discussed in the paragraphs above.

1. Timely Implementation of the Joint Venture

We tentatively found above that we should not make an indefinite grant of antitrust immunity. The basis for our finding was that the Joint Applicants had not yet implemented A++, and many of the public benefits identified in the record depended upon the successful implementation of that agreement.

As a condition of obtaining and retaining a grant of immunity, we are proposing to require the Joint Applicants to submit evidence that A++ has been implemented. If, within 18 months of the issuance of a final order, they have not submitted verified statements attesting to the full implementation of the joint venture and copy of the written joint venture agreement, the antitrust immunity granted to the proposed alliance would automatically expire. The Joint Applicants

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[56] Answer of the Travel Agents at 19-23 (Nov. 26, 2008).

[57] *See* Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Final Order 2008-5-32 at 4 (Docket DOT-OST-2007-28644).

[58] *See, e.g.*, Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Final Order 2008-5-32 at 4-6 (Docket DOT-OST-2007-28644).

stated that they are prepared to accept a condition of this nature.[59] We believe that the condition is necessary to ensure the realization of public benefits.

2. Carve Outs

We tentatively found above that no new carve outs should be imposed, and that some, but not all, of the existing carve outs should be removed. If the authority herein becomes final, the proposed alliance would not operate with any new carve outs in transatlantic or transborder markets. Once the A++ agreement is implemented, we would remove the existing carve outs in the Chicago/Washington-Frankfurt markets. We would not, however, remove the existing carve outs in the Chicago/San Francisco-Toronto markets.

3. Preservation of Competition in Domestic Markets

We tentatively found above that it was necessary to take special precautions in order to preserve competition in domestic markets. To address concerns about competitive harm that could result from the inclusion of two U.S. carriers in the immunized alliance, the Joint Applicants have submitted proposed language, reviewed by DOJ, clarifying that the U.S. antitrust laws remain applicable to the Joint Applicants' conduct in any market for air transportation solely within the United States. The proposed language is set forth in Appendix A to this Order.

Additionally, the applicants have submitted two separate sets of confidentiality guidelines designed to prevent the sharing of competitively sensitive information concerning air transportation in domestic markets. The guidelines apply to (1) discussions between Continental and United and (2) discussions between Continental, United, and Lufthansa, which holds a financial stake in a U.S. airline. We are proposing to require the applicants to adhere to the confidentiality guidelines and file any material amendments to them with the Department of Transportation on an ongoing basis.

4. Annual Reporting

We tentatively found above that additional reporting was necessary to monitor commercial developments and ensure that public benefits are being realized. We are proposing to require the Joint Applicants to file annual progress reports. The reports should focus on the progress made by the applicants towards achieving their stated goals for operating an alliance with antitrust immunity, the specific actions they have taken to implement each of their alliance agreements (including especially joint venture agreements), the present or future planned cooperation among the alliance partners in all core airline functions, and a discussion of the public benefits that are being realized.

5. O&D Survey Data Reporting

[59] Joint Application at 13, 104.

The Department's Origin-Destination Survey of Airline Passenger Traffic ("O&D Survey") requires U.S. carriers to submit traffic data in markets they serve singularly or jointly with foreign airlines. We also collect special O&D Survey code-share reports for certain large alliances, and have directed all other U.S. airlines to file reports for their transatlantic code-share operations.

However, we receive no market information for passengers traveling to or from the United States when their entire trip is on foreign airlines, except for T-100 data for nonstop and single-plane markets. Such passengers account for a substantial portion of all O&D traffic between the United States and foreign cities, and the absence of such information severely handicaps our ability to evaluate the possible economic and competitive consequences of the decisions we must make regarding international air service.

As in previous cases,[60] we have tentatively decided to continue to require Air Canada, Austrian, bmi, Lufthansa, LOT, SAS, Swiss, and TAP to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point. This duty encompasses all traffic to third countries in which the itinerary includes a U.S. point.

To prevent this reporting requirement from unfairly harming the foreign applicants' competitive positions, we have tentatively decided to grant confidentiality to their Origin-Destination reports and special reports on code-share passengers. Currently, we grant confidential treatment to all international Origin-Destination data. We provide these data confidential treatment because of the potentially damaging competitive impact on U.S. airlines and the potential adverse effect upon the public interest that would result from unilateral disclosure of these data (data covering the operations of foreign airlines that are similar to the information collected in the Passenger O&D Survey are generally not available to the Department, to U.S. airlines, or to other U.S. interests).

Our regulation, 14 C.F.R. Part 241 section 19-7(d)(1), provides for disclosure of international O&D Survey data to air carriers directly participating in and contributing to the O&D Survey. While we have tentatively found it appropriate to direct Air Canada, Austrian, bmi, Lufthansa, LOT, SAS, Swiss, and TAP to provide certain limited Origin-Destination data to the O&D Survey, they are not air carriers within the meaning of Part 241. The regulation (14 C.F.R. Part 241, Section 03) defines an air carrier as "[a]ny citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." Air Canada, Austrian, bmi, Lufthansa, LOT, SAS, Swiss, and TAP accordingly would have no access to the data filed by U.S. air carriers. Therefore, we would keep submissions confidential while maintaining the current restriction on access to U.S. air carrier Origin-Destination data by foreign air carriers.

6. IATA Tariff Coordination

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60 *See, e.g.*, United/Lufthansa/Austrian/SAS/Swiss/LOT/TAP/Air Canada Case, Order 2007-2-6 (Docket DOT-OST-2005-22922). We treat the foreign airlines' O&D data as confidential, do not allow U.S. airlines any access to the data, and do not allow foreign airlines any access to U.S. airline O&D Survey data. We use these data only for internal analytical purposes.

As we have found in earlier decisions, it is contrary to the public interest to permit immunized alliances to participate in certain price-related coordination that is immunized within IATA tariff coordination. We therefore tentatively decide to condition our approval of and grant of antitrust immunity for the Alliance Agreements by requiring the Joint Applicants to withdraw, or to remain withdrawn, from participation in any IATA tariff activities that affect or discuss any proposed through fares, rates or charges applicable between the United States and any countries whose airline(s) have been or are subsequently granted antitrust immunity by the Department for participation in similar alliances. Such countries include the homelands of Air Canada, Austrian, bmi, Lufthansa, LOT, SAS, Swiss, and TAP.[61]

We tentatively find that this condition is in the public interest for several reasons. The immunity that is requested in this proceeding includes broad coverage of price coordination activities among the Joint Applicants. Because the Joint Applicants already contemplate price coordination under the Alliance Agreements, tariff coordination through the IATA mechanism is duplicative and unnecessary. At the same time, we have tentatively found that the public benefits of the proposed alliance will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance Agreements themselves.

We have previously found in similar cases that competition is undermined if the alliance partners are permitted to continue tariff coordination within IATA. In the earlier decisions, we required the parties to withdraw from IATA tariff coordination activities between the United States and the homelands of the foreign alliance partners, and between the United States and the homelands of all other airlines who have a grant of antitrust immunity from this Department. Through prices between the United States and other countries, as well as all local fares in intermediate and beyond markets, are not covered by the condition.[62] Subsequently, the Department ended antitrust immunity for all IATA tariff coordination activities affecting

[61] This condition currently applies to prices in markets that are subject to our prior antitrust immunity orders. Those markets are U.S.-Netherlands, U.S.-Germany (Order 96-5-27 at 17), U.S.-Denmark/ Norway/ Sweden (Order 96-11-1 at 23), U.S.-Austria (Order 2001-1-19 at 16), U.S.-Chile (Order 99-9-9 at 21), U.S.-Iceland (Order 2000-10-13 at 16), U.S.-Panama (Order 2001-5-1 at 11), U.S.-New Zealand (Order 2001-4-2 at 3), U.S.-Czech Republic/ France/ Italy (Order 2002-1-6 at 7), U.S.-Republic of Korea (Order 2002-6-18 at 14; Order 2003-5-18 at 12), U.S.-Finland (Order 2002-7-39 at 10), U.S.-Belgium (Order 2004-4-10 at 12), U.S.-Jordan (Order 2005-1-23 at 13), U.S.-Peru (Order 2005-10-8), U.S.-Poland/ Portugal/ Switzerland/ Canada (Order 2007-2-6), and U.S.-United Kingdom (Order 2007-9-12). Also, by letter dated May 8, 1996, Northwest and KLM indicated their willingness to limit voluntarily their participation in IATA (Dockets DOT-OST-96-1116 and DOT-OST-95-618).

[62] In addition to the foreign applicants' homelands, under this condition the partners could not participate in IATA discussions of the total ("through") price (*see* 14 C.F.R. § 221.4) between a U.S. point of origin or destination and an origin or destination in any of the countries listed above, or in the homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitrary or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

transatlantic and U.S.-Australia markets.[63] Thus, there is no immunity for any carrier to participate in tariff coordination between the United States and Norway, Switzerland and any present or future EU member state, including Austria, Denmark, Germany, Poland, Portugal, Sweden, and the United Kingdom. For this reason we see no need to re-state a condition requiring the applicants to withdraw from participation in IATA tariff coordination between those particular eight countries and the United States.

7. Computer Reservations Systems Issues

Consistent with recent cases, we are not proposing any conditions regarding the management of Computer Reservations Systems (CRSs).[64] Any coordination between the applicants concerning the operation of separate businesses, such as CRSs, would not be transactions specifically approved or necessarily contemplated by our orders in this proceeding. While the Joint Applicants, individually or collectively, may maintain an interest in a CRS, the grant of immunity in this Order thus does not extend to their management of any interest they may have in individual CRSs.[65] On the other hand, the applicants' alliance relationships will likely require the coordination of the presentation and sale of the airlines' own services in the CRSs and each airline's operation of its internal reservations systems. Those activities will necessarily be covered by a grant of antitrust immunity.

8. Operation under a Common Name

Because operation of the Alliance Agreements could raise important consumer issues and "holding out" questions, if the Joint Applicants choose to operate under a common name or use "common brands," they must seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more airlines to be unfair and deceptive and in violation of the Act

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[63] IATA Tariff Conference Proceeding, Order 2007-3-23 (Docket DOT-OST-2006-25307). In that order we disapproved the International Air Transportation Association's Provisions for the Conduct of the IATA Traffic Conferences insofar as that agreement authorized U.S. and foreign carriers to discuss and agree upon fares, rates, conditions of service, and price and rate applicability conditions, either directly or indirectly or through tariff conferences or other related means of information sharing for passenger and cargo air services (i) between the United States and the European Union (together with Iceland, Norway, Switzerland, and Liechtenstein); (ii) between the United States and the overseas territories of the member states of the European Union subject to an air services agreement between the United States and a member state; and (iii) between the United States and Australia.

[64] *See, e.g.*, Delta/Northwest/Air France/KLM/Czech/Alitalia Case (SkyTeam II), Final Order 2008-5-32 (Docket DOT-OST-2007-28644).

[65] While any antitrust immunity granted in this proceeding would not cover the activities of Amadeus or any other system in which one of the Joint Applicants has an interest, we do, of course, have the authority under 49 U.S.C. § 41712 to prohibit any system operating in the United States from engaging in unfair or deceptive practices or unfair methods of competition. The Court of Appeals has upheld our determination that we had such jurisdiction. *Sabre, Inc. v. Dept. of Transportation*, 429 F.3d 1113 (D.C. Cir. 2005). We also have the authority to take action against conduct by a foreign system or a foreign airline that unreasonably discriminates against a U.S. system. 49 U.S.C. § 41310(g).

unless the airlines give reasonable and timely notice to passengers of the actual operator of the aircraft. 14 CFR 399.82.

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final the tentative findings and conclusions discussed herein. Objections or comments to our tentative findings and conclusions shall be due no later than 21 calendar days from the service date of this Order, and answers to objections shall be due no later than seven business days thereafter;

2. We tentatively approve and grant antitrust immunity to alliance agreements between and among Air Canada, Austrian, British Midland Airways, Continental Airlines, Inc., Deutsche Lufthansa, Polskie Linie Lotnicze LOT, Scandinavian Airlines System, Swiss, TAP Air Portugal, and United Air Lines, Inc., in so far as such agreements relate to foreign air transportation;[66]

3. We tentatively direct the Joint Applicants, within eighteen months of the issuance of a final order in this case, to file with the Director of the Office of Aviation Analysis the following as evidence that the four-way joint venture has been implemented:

    a. Verified statement(s) in Docket OST-2008-0234 attesting that the Atlantic Plus-Plus joint venture has been executed and implemented pursuant to the terms described in the Joint Application, Exhibit JA-1 (Transatlantic Joint Venture Agreement), and

    b. A complete and unredacted copy of the Atlantic Plus-Plus joint venture agreement with appendices.

    We tentatively determine that, unless the Joint Applicants make the filings described in this ordering paragraph, the authority herein shall expire and the grant of antitrust immunity shall be automatically withdrawn;

4. We tentatively direct the Joint Applicants to submit annual progress reports to the Office of Aviation Analysis, beginning one year from the date of issuance of a final order in this case, and continuing each year thereafter while the Alliance Agreements are effective;[67]

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[66] The alliance agreements shall mean those agreements referred to on page 2, Footnote 2, and Exhibit JA-1, of the Joint Application filed on July 23, 2008.

[67] We expect the Joint Applicants to deliver the progress report by the close of business on the anniversary date. If that date falls on a weekend or federal holiday, the Joint Applicants may deliver the report by the close of business on the following business day.

5. We tentatively determine that, if the conditions of Ordering Paragraph 3, above, are met, our approval and grant of immunity will remain in effect indefinitely, provided that the Joint Applicants:

   a. Submit for prior approval any confidentiality guidelines or subsequent subsidiary agreements implementing their Alliance Agreements;[68]

   b. Resubmit the Alliance Agreements before five years from the date of issuance of the final order in this case; and

   c. Obtain prior approval if they choose to operate or hold out service under a common name or use common brands;

6. We tentatively determine that, unless and until the conditions of Ordering Paragraph 3, above, are met, our approval and grant of immunity is subject to the limits and conditions described in Appendix A of Order 96-5-27 (concerning carve outs in the Chicago-Frankfurt and Washington IAD-Frankfurt markets);

7. We tentatively determine that our approval and grant of immunity is subject to the limits and conditions described in Appendix A of Order 97-9-21 (concerning carve outs in the Chicago-Toronto and San Francisco-Toronto markets);

8. We tentatively determine that our approval and grant of immunity is subject to the limits and conditions described in Appendix A to this Order concerning the applicability of the U.S. antitrust laws;

9. We tentatively direct Air Canada, Austrian, British Midland Airways, Continental Airlines, Inc., Deutsche Lufthansa, Polskie Linie Lotnicze LOT, Scandinavian Airlines System, Swiss, and TAP Air Portugal, and United Air Lines, Inc. to withdraw, or to remain withdrawn, from participation in any International Air Transport Association tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and any countries whose airlines have been or are subsequently granted antitrust immunity, or renewal thereof, to participate in similar alliance activities with a U.S. airline(s);

10. We tentatively direct Air Canada, Austrian, British Midland Airways, Deutsche Lufthansa, Polskie Linie Lotnicze LOT, Scandinavian Airlines System, Swiss, and TAP Air Portugal to continue to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a U.S. point;

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[68] Regarding this requirement, we do not expect the Joint Applicants to provide the Department with minor technical understandings that are necessary to implement fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct them to provide the Department with all unredacted contractual instruments that may materially alter, modify, or amend the cooperation agreements, joint ventures, or confidentiality guidelines. Any appropriate documents shall be submitted to the Director, Office of Aviation Analysis.

11. We tentatively delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in paragraph 8 as to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition, as previously described;

12. We tentatively determine that we may amend, modify, or revoke this authority at any time without hearing;

13. We grant all motions for leave to file submitted prior to the date of issuance of this Order;

14. We will serve this Order on all parties on the service list in this docket.

By:

SUSAN McDERMOTT
Acting Assistant Secretary for Aviation
and International Affairs

(SEAL)

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APPENDIX A

The United States antitrust laws, and the defenses available thereunder, shall remain fully applicable to claims that the Joint Applicants' conduct has resulted in or would result in an unlawful restraint of competition within any market for air transportation solely within the United States.

In any civil or criminal action or federal investigation relating to anticompetitive conduct involving a market for air transportation solely within the United States, the Joint Applicants shall not assert that immunity granted by this Order exempts them from an obligation to produce any documents or other evidence.

The conduct immunized by this Order is subject to the Continental-United Antitrust Guidelines and the United-Lufthansa-Continental Guidelines (the "Guidelines") submitted as Exhibit JA-2 to the Joint Application, as amended pursuant to agreement between Continental/United and the U.S. Department of Justice.[69] Conduct that is not in accordance with the Guidelines is not immunized. Continental and United shall submit the Guidelines, as amended, as an implementing agreement, and Continental and United shall also submit any proposed revisions to the Guidelines.

[69] *See* Letter from Keiner, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 12/18/08; Letter from Heffernan, Counsel for Joint Applicants, to Beard, Chief of DOT Dockets, of 1/14/09.